Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 302 of the Telecommunications Act of 1996	)	CS Docket No. 96-46
	)	
	)	
Open Video Systems	)	

COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. ("Cox"), by its attorneys, hereby submits these comments in response to the Commission's *Notice of Proposed Rulemaking* (the "*Notice*") in the above-referenced proceeding.

I. INTRODUCTION

The *Notice* requests comment on a variety of issues regarding open video systems ("OVS"), a new form of video service established by the Telecommunications Act of 1996 (the "1996 Act") in which the service provider makes available up to two-thirds of its channel capacity to unaffiliated programmers. In return, OVS providers are not subject to certain provisions of Title VI, most notably the franchise requirement. The 1996 Act outlines only the general parameters applicable to OVS, while leaving many details to be resolved by the Commission in this proceeding.

In permitting LECs to provide traditional cable service or OVS, it is apparent that Congress intended OVS to be a different service than cable, both from a regulatory and a business perspective. Consequently, as it implements regulations to govern OVS providers, it is imperative that the Commission fully explain how the two services will be different. In implementing the statutory requirements, the Commission also must strive to maintain a level playing field for all competitors in the video market. The Commission cannot allow OVS to become a vehicle for LECs to provide a service that is virtually identical to traditional cable yet subject to far less intrusive regulation.

In order to spur competition as Congress intended -- as well as maintain a level competitive playing field -- Cox believes cable operators should be entitled to provide OVS service over their own facilities or to provide video programming over an OVS facility owned by a telephone company. In either case, the additional flexibility will better permit cable operators to serve the needs of their current and future customers.

Robust competition in the video marketplace requires that the Commission prevent cross-subsidization of OVS and ensure that the financial burden of a telephone company's investment in nonregulated cable or OVS facilities does not fall on its telephone ratepayers. To achieve this objective, a cost allocation standard should be applied uniformly across all forms of LEC video facility investments, including costs incurred before the effective date of the OVS rules. Additionally, the Commission must restrict the ability of telephone companies to jointly market OVS and local exchange service until the LEC has opened its network to competitors in compliance with the requirements of the 1996 Act.

II. CABLE OPERATORS SHOULD HAVE THE FLEXIBILITY TO OPERATE OPEN VIDEO SYSTEMS AND PROVIDE PROGRAMMING ON TELEPHONE COMPANY OPEN VIDEO SYSTEMS.

Section 653(a)(1) of the Communications Act of 1934, as amended by the 1996 Act, provides the Commission with discretion to permit cable operators to "provide video programming through an open video system" if it is in the public interest. The Commission tentatively concludes that, "if the statutory language permits . . . there may be significant benefits to permitting cable operators and others to become open video system operators."[1/] As shown below, the 1996 Act plainly can and should be read to permit such a result.

The Commission is correct that the public interest would be served by permitting cable operators to become OVS operators because one of the principle accomplishments that Congress sought to achieve by passage of the 1996 Act was increased competition between

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1/ *Notice* at ¶ 64.

facilities-based service providers. Cable participation in the provision of facilities-based OVS services will promote robust competition between competing OVS providers which will benefit third party programmers by increasing the number of channels available for lease. Additionally, Congress' goal of encouraging "the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" will be facilitated by the ability of operators to participate in the provision of facilities-based OVS services because cable operators will have additional regulatory flexibility when investing in new facilities.[2/]

While acknowledging the public interest benefits of cable operator participation in the OVS market, the *Notice* raises the statutory question of whether there is any significance to the fact that Section 653 permits telephone companies to provide "cable service to its cable service subscribers" over an OVS facility, but gives the Commission discretion to permit cable operators and "any other person" to provide "video programming" over an OVS facility.[3/] The implication is that this choice of words might be read to give the Commission discretion only to permit cable operators and other persons to provide programming on an OVS facility, but not to be a facilities-based OVS provider.

Although "cable service" and "video programming" are defined differently under the Act, it is apparent that Congress did not intend to prevent cable operators from operating OVS systems. These terms both are contained in Section 653(a)(1), which specifically deals

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2/ *Id.* at ¶ 73.

3/ Section 653(a)(1) provides, in part:

> (1) CERTIFICATES OF COMPLIANCE.--A local exchange carrier may provide cable service to its cable service subscribers in its telephone service area through an open video system that complies with this section. To the extent permitted by such regulations as the Commission may prescribe consistent with the public interest, convenience, and necessity, an operator of a cable system or any other person may provide video programming through an open video system that complies with this section.

with "Certificates of Compliance" for OVS operators. If Congress meant only to give the Commission discretion to permit cable operators and others to provide programming on a LEC OVS facility, but not to be OVS providers themselves, it would not have placed this provision in the section dealing with certification, which is a requirement applicable only to the OVS provider. Instead, it would have placed it in Section 653(b)(1), which specifies the rules to be adopted by the Commission governing the operation of OVS systems.

A contrary reading of the statute would produce results that are inconsistent with congressional intent. As described below, the nondiscrimination requirement contained in Section 653(b)(1)(A) makes it clear that cable operators have the right to use the facilities of an OVS system operator. If the statute were read to grant the Commission discretion with regard to whether certain classes of programmers, such as cable operators, could use the capacity of an OVS facility it would be inconsistent with the nondiscrimination requirement of the statute. Such a reading would raise First Amendment concerns as well. Therefore, cable operators or other persons should have the absolute right to use an OVS facility, as well as to own and operate an OVS facility subject to the same certification requirements applicable to other OVS providers under Section 653(a)(1).[4/]

The *Notice* also raises the question whether an OVS provider should be permitted to prohibit a cable operator from occupying channels on the OVS.[5/] There is no legal basis to permit OVS providers such discretion. Section 653(b)(1)(A) contains a bar against

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4/ While the *Notice* does not address the issue, it is plain from review of the statute that a cable operator unquestionably would be permitted to operate an OVS system if it is also a local exchange carrier, as that term is defined in the 1996 Act. It is equally plain that should a cable operator that is a local exchange carrier decide to convert its cable system to an OVS facility, it is entitled to nondiscriminatory treatment by municipalities *vis-a-vis* an incumbent LEC offering OVS. This result is required under Section 253(c) of the 1996 Act which imposes a nondiscrimination requirement on municipalities with regard to telecommunications carriers.

5/ *Id.* at ¶ 15.

discrimination with regard to carriage of a programmer on an OVS facility. This prohibition is absolute and is not limited only to unjust and unreasonable discrimination as is the clause in the same subsection regarding rates, terms and conditions.[6/] Thus, there is no legal basis upon which the OVS provider could bar a cable operator from using channels on the OVS facility.

Furthermore, it is in the public interest to permit cable operators to use OVS channels to provide programming to subscribers. As described above, cable operator participation in the OVS market is consistent with Congress' intent to introduce vigorous competition in the video marketplace.[7/] A policy that limited the range of possible program providers on an OVS facility would not promote competition. Because OVS service areas may be larger than cable franchise areas, OVS is a legitimate mechanism for a cable operator to expand the reach of its programming beyond its franchised service area. In doing so, a cable operator not only would be providing additional competition to other programmers on the OVS facility, it also would be providing additional competition for the incumbent cable operator in those markets. Accordingly, LECs should not have the discretion to exclude cable operators from providing video programming on OVS facilities.

III. THE COMMISSION MUST ADOPT REQUIREMENTS THAT LIMIT ANTICOMPETITIVE BEHAVIOR BY LECs.

A. The Commission must prescribe procedures for allocating common costs of LEC video facilities.

The Commission acknowledged in its video dialtone proceedings that it is critical to ensure that the costs of a video service are not subsidized by revenues from captive telephone

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6/ Section 653(b)(1)(A) states that the Commission's regulations must prohibit an OVS operator from "discriminating with regard to carriage on its open video system, and ensure that the rates, terms and conditions for such carriage are just and reasonable, and are not unjustly or unreasonably discriminatory."

7/ *Notice* at ¶ 15.

ratepayers when telephone companies provide video programming over facilities that also are used for telephone service.[8/] This concern requires the Commission to be sure that direct costs are directly assigned to unregulated video services and that common costs of the video facility are not unreasonably allocated to telephone services.[9/] These basic principles are just as critical in implementing a predictable framework for OVS as they were in implementing video dialtone regulations.

Cox agrees with the Commission's conclusion that OVS, like cable, is a non-regulated service for accounting purposes and that common costs in the first instance must be allocated between OVS and regulated telephone services pursuant to Part 64 of the Commission's rules.[10/] Part 64 establishes:

> an attributable cost method of fully distributed costing, which requires that carriers directly assign costs to either regulated or nonregulated activities whenever possible . . . Costs that cannot be assigned or allocated based on any cost-causative measure are allocated using a general allocator . . . [11/]

8/ "We are committed to implementing video dialtone in a manner that does not subject basic telephone ratepayers to unreasonable rate increases or allow improper cross-subsidization." *Telephone Company-Cable Television Cross-Ownership Rules*, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244, 322 (1994).

9/ "We expect LECs to include in direct costs a reasonable allocation of other costs that are associated with shared plant used to provide video dialtone and other services." *Id.* at 345. Direct costs are those costs that result directly from the telephone company's decision to provide a particular service or services. The cost of facilities that are used for multiple services (*i.e.* common or shared costs) are direct costs that must be allocated between those services.

10/ *Notice* at ¶ 70. Imposition of Part 64 accounting requirements is consistent with the requirement that OVS not be subject to Title II regulation because these requirements only apply when a LEC provides nonregulated services, such as Title VI cable service.

11/ *Separation of costs of regulated telephone service from costs of nonregulated activities*, Order on Reconsideration, 2 FCC Rcd 6283, 6285 (1987).

For outside plant and central office equipment, which likely will be the largest part of a carrier's OVS investment, common costs are allocated "based upon the relative regulated and nonregulated usage of the investment" for a three year forecast period.[12/] However, the Commission has not yet explained how LECs should be required to interpret this provision. Rather, the Commission contemplates initiating a separate proceeding to resolve the issue of how to allocate common costs associated with OVS and telephone plant.

The Commission should not defer addressing the critical question that must be answered before telephone companies can be permitted to operate as OVS providers. Proceedings should be commenced immediately to establish the cost allocation rules that will be implemented for OVS so that these rules are in place when companies file their certifications to provide OVS and so that companies can demonstrate their compliance.[13/] Until these allocation rules are established, LECs should be required to establish separate accounts to record any costs incurred in connection with facilities used for video programming services. Failure to move quickly to resolve this issue creates a great cross-subsidy potential, particularly if LECs are not ultimately required to reach back and reassign costs they are incurring today on network rebuilds.[14/]

12/ 47 C.F.R. § 64.901(b)(4).

13/ In the past, Commission review of LEC cost allocation proposals on a case-by-case basis was contentious, costly and time consuming for the Commission, the LECs and for cable operators. It would be beneficial for all parties concerned if the Commission were to provide more regulatory certainty by establishing cost allocation rules for OVS before permitting LECs to provide service.

14/ LECs have argued that price cap rules at the federal and state level prevent cross-subsidization of video services. As Cox has demonstrated in previous filings, this assertion simply is not correct. The current FCC price cap rules preserve a LEC's incentive to shift costs to noncompetitive services because the option to elect sharing and the productivity factor both retain the link between rates and costs. Similar incentives exist in most price cap plans adopted at the state level. *See, e.g.*, Letter from James O. Robbins,

(continued...)

The status of costs associated with former video dialtone systems that will be used for OVS or one of the other forms of video service which LECs may now provide also should be addressed by the Commission in this proceeding. Many LECs have incurred substantial costs in connection with video dialtone, but the *Notice* terminated the accounting and reporting requirements under which these costs were monitored.[15/] These costs now are in a regulatory limbo in which the potential for misallocation is magnified significantly.[16/] To address this problem, LECs should certify that all common costs of OVS will be allocated pursuant to Part 64 requirements, including all costs incurred prior to the effective date of the OVS rules.

The *Notice* also states that a telephone company that provides OVS must make appropriate revisions to its Cost Allocation Manual ("CAM").[17/] These revisions should be made as soon as the LEC begins to incur costs connected with OVS, such as planning, development and construction. A LEC should certify that all costs incurred to date and in

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14/ (...continued)
President and Chief Executive Officer, Cox Communications, Inc. to Reed E. Hundt, Chairman, Federal Communications Commission (June 28, 1995).

15/ *Notice* at ¶ 75. The Commission did not, however, require LECs now providing video dialtone to terminate service. The Commission should clarify that video dialtone trials must terminate at the end of the carrier's trial authorization and that commercial video dialtone services must convert to a form of video service permitted under the 1996 Act upon adoption of rules in this proceeding.

16/ For example, according to Bell Atlantic's Video Dialtone Report for the 3rd Quarter of 1995, all the shared costs of its Dover, New Jersey video dialtone facility were booked to plant under construction. Until new rules are adopted in this proceeding, it is uncertain how Bell Atlantic is treating these costs and additional costs that it incurs as it continues to build its Dover facility. The Commission must ensure that all the costs of the Dover facility and other former video dialtone systems (including those built for video dialtone trials) that subsequently are used for OVS or cable are accounted for pursuant to the Commission's Part 64 rules. It also should require those LECs to continue keeping subsidiary accounting records to achieve this objective.

17/ *Notice* at ¶ 70.

the future will be categorized pursuant to these CAM revisions. Without this requirement, LECs could build and test their entire OVS system before filing CAM revisions and attempt to treat all these costs as regulated telephone costs. This result plainly would not be in the public interest.

B. Restrictions on joint marketing of local exchange and OVS service are needed until interconnection issues are completely resolved.

The Commission also questions whether limits should be imposed on the ability of an OVS provider to bundle its OVS service with other services and whether there is a need for a restriction on joint marketing.[18/] Cox believes there is a need for such a restriction in certain circumstances to ensure that cable operators and telephone companies compete on a level playing field. Specifically, a telephone company could bundle its local exchange and OVS offering while effectively preventing cable operators in its service area from offering a competing package by delaying the resolution of interconnection issues. Therefore, LECs should not be permitted to jointly market OVS with local exchange service until a state certifies that the LEC is in compliance with all the obligations imposed under Sections 251 and 252 of the 1996 Act.

The Commission also must ensure that LECs do not take advantage of their access to customer proprietary network information ("CPNI") in marketing OVS service to end users. Section 222 of the Communications Act, which was added as part of the 1996 Act, places significant restrictions on the use of CPNI gathered by a LEC in connection with its provision of telephone service. The Commission should require as part of the OVS certification a statement from the LEC which explains the procedures that are in place to ensure that this information will not be used in the marketing of OVS services.

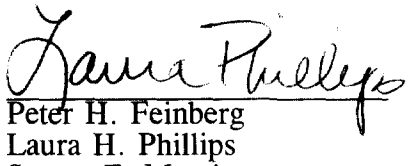
18/ *Notice* at ¶ 66.

IV. CONCLUSION

Congress has determined that provision of video programming through an open video system can be beneficial to the public. To maximize the public benefit of OVS, however, full participation in the OVS market by cable operators, either as facilities-based providers or as programmers on the OVS facility of a telephone company, must be available under the Commission's rules. Furthermore, the benefits of OVS will result only if the Commission promptly adopts appropriate safeguards to prevent cross-subsidization of OVS at the expense of captive telephone ratepayers and prohibits joint marketing of OVS and local exchange service until a LEC opens its network to competitors in compliance with the 1996 Act.

Respectfully submitted,

COX COMMUNICATIONS, INC.



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